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IN THE

Supreme Court of the United States

October Term, 1961

No. 550

ANTHONY MARCHITTO,

Petitioner,

—v.—

WATERFRONT COMMISSION OF NEW YORK HARBOR.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Dated, November 12, 1961.

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ANTHONY MARCHITTO,

Petitioner,

—v.—

WATERFRONT COMMISSION OF NEW YORK HARBOR.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the order of the Court of Appeals of the State of New York made on October 5, 1961 which denied petitioner's motion for leave to appeal from an order of the Appellate Division, First Department unanimously affirming an order made herein on March 20, 1961 by the Supreme Court of the State of New York adjudging the petitioner in civil contempt and committing him to prison until he answers certain questions of the Waterfront Commission of New York Harbor.

Opinions Below

There were no opinions in the Court of Appeals or in the Appellate Division. The opinion in the Supreme Court of the State of New York (herein called Special Term) adjudging the petitioner in civil contempt has not been officially reported and is printed in the Appendix, *infra*, page 30. The orders of the Court of Appeals, and the Supreme Court are likewise printed in the Appendix, *infra*, pp. 29 *et seq.*

Jurisdiction

The order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal was entered on October 5, 1961. On October 13, 1961, Mr. Justice Harlan granted petitioner's application for a stay herein pending the filing and disposition of a petition for a writ of certiorari, provided the petition were filed on or before November 14, 1961 and petitioner post a surety bond in the sum of $10,000. Said bond has been duly posted, approved and filed. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Questions Presented

Petitioner was adjudged in civil contempt in a proceeding instituted in the Supreme Court of the State of New York by respondent Waterfront Commission of New York Harbor by reason of his refusal on the ground of constitutional privilege to answer certain questions put to him by the Commission. The Commission is an agency created by the Waterfront Commission Act, an interstate compact enacted by the States of New York and New Jersey with the consent of Congress. In this context, the questions presented are:

1. Whether petitioner was denied due process where he was denied the hearing he demanded in the quasi-criminal contempt proceedings and was adjudicated in contempt solely upon affidavits.

2. Whether petitioner was adjudicated in contempt in violation of the Waterfront Commission Act in that (a) he was immune from process instituting the contempt proceedings while in New York pursuant to a Commission subpoena to testify, and (b) the Commission failed to comply with the statutory conditions precedent to the grant of immunity.

3. Whether petitioner was deprived of due process because his entry into the State of New York was enticed by the Commission's fraud and misrepresentation in order to serve him with process in the contempt proceeding.

4. Whether an agency created by interstate compact with the consent of Congress which collaborates with other agencies of the federal government in the investigation of federal crime can compel testimony in the absence of immunity from federal prosecution.

5. Whether such an agency is subject to the requirements of due process as declared by this Court to be applicable to Congressional and state legislative committees.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are Article I, § 10, cl. 3 and the Fifth, Sixth and Fourteenth Amendments to the Constitution.

The statutes involved are the Waterfront Commission Act, an interstate compact enacted by the States of New York and New Jersey (New York Laws, 1953, c. 282, McKinney Unconsol. Laws (6700-a, *et seq.*; New York Laws 1953, c. 202, c. 203, N. J. S. A. 32; 23 1, *et seq.* with the consent of Congress, 67 Stat. 541, Act of August 12, 1953, c. 407). The New York statutes now appear as McKinney Unconsol. Laws, Title 29, Sections 9801-9937.

The pertinent constitutional and statutory provisions appear in the Appendix, *infra*, pages 20-25.

Statement

Petitioner is a life-long resident and citizen of the State of New Jersey where he has been employed for more than twenty-five years (R. 70). Respondent is the Waterfront Commission of New York Harbor (herein called the "Commission") created by an interstate compact, the Water-

front Commission Act, *infra*, pages 21-24, in order to eliminate evil conditions on the New York waterfront. The Commission is authorized to license and register waterfront workers, to investigate waterfront practices, and to recommend the improvement of waterfront conditions.

Petitioner was alleged by the Commission to be a trustee of two local unions of the International Longshoremen's Association (herein called the "ILA") (R. 92). Neither local is claimed to be within the Commission's jurisdiction since they are warehouse rather than waterfront unions. Their members are not required to be licensed under the compact and their employers are not governed by the compact (R. 94-95).

In early June, 1960, petitioner came from New Jersey to New York in response to a subpoena which had been served upon him in New Jersey and whose validity he had unsuccessfully challenged in the New Jersey Courts (R. 92, 93). He was interrogated by the Commission in executive session in the course of which he asserted his constitutional privilege against self-incrimination (R. 111).

Thereupon, he was directed to appear before the Commission on June 22, 1960, in a public session where he was again ordered to answer substantially the same questions and purportedly offered immunity against prosecution for state, not federal, crime. The Commission did not indicate the subject matter of the investigation, the purpose of the investigation, or the pertinency of the questions. Some of them were of the kind held not pertinent in *Bowers* v. *United States*, 202 F. 2d 447 (C. A. D. C., 1953); others, such as petitioner's involvement in department store and drug store strikes, were seemingly irrelevant to an investigation of waterfront conditions.

Petitioner declined to answer the questions on the ground that the Commission had failed to comply with the conditions precedent to an offer of immunity. In this Court,

we limit the claim of non-compliance to two facts: (1) non-compliance with the statutory provision that notice of the offer of immunity be given to all state officials "having an official interest therein"; and (2) non-compliance with the constitutional requirement that in a case of this kind, federal immunity must also be given (*infra*, p. 14).

The Commission then directed the petitioner to return the following day from his home in New Jersey to the Commission's public hearing in New York, purportedly to testify before the Commission. Apparently, however, its purpose was to subject him to service of process in the instant contempt proceedings (R. 42, 71-73).

Upon his return to New York, on June 23, 1960, the Commission made a *pro forma* inquiry of petitioner as to whether he had "changed your position" (R. 74). It then served him with the order to show cause instituting these proceedings to adjudge him in contempt. Whereupon, petitioner moved at Special Term to vacate service under Section 237-a of the Civil Practice Act upon the grounds: (1) that he was exempt from service of the said order to show cause by reason of the provisions of the Waterfront Commission Act, Part II, Section 5-m, McKinney Unconsolidated Laws, Section 6700, tt-13; and (2) that he had been enticed by the Commission into the State of New York for the purpose of service of process (R. 68, 69).

The first ground of the motion involving the federal question of the construction of an interstate compact was raised in petitioner's cross-notice of motion (R. 68) and in his affidavit (R. 70). See also, *infra*, p. 11. The second ground, involving a denial of due process, is similarly set forth (*ibid.*).

The motion was denied by the Supreme Court Special Term, New York County, (R. 84-85) and the order of denial was affirmed by the Appellate Division upon an interlocu-

tory appeal. Petitioner preserved the jurisdictional point in the subsequent contempt proceedings as he was entitled to do under Section 237-a, sub. 3(c) of the Civil Practice Act (R. 164). On August 2, 1960, petitioner moved in the Supreme Court, New York County to take the deposition of the Waterfront Commission by its agents and for a discovery (R. 87-90). His affidavit recited his prior appearance in the executive session of the Commission on or about June 2, 1960, stated that the questions at the executive and public sessions were essentially the same, and that "the purpose of conducting a public session, June 22, 1960, was therefore an improper one, and solely for the purpose of exposing your deponent and violating his right of privacy" (R. 93).

Petitioner also stated the necessity of a deposition and discovery to support his claim as to lack of *bona fides* in subpoenaing him and offering him immunity, failure to make luminous the subject matter of the investigation, failure to comply with the applicable statutes as condition to an immunity grant, and the fact that the subpoenas were the result of collaboration between the Commission and specified federal agencies. (See Appendix C, *infra*, pp. 26-28.) The denial at Special Term of the motion for discovery and inspection at Special Term (R. 140-46) was affirmed by the Appellate Division.

On June 28, 1960, petitioner served the Commission with a notice to admit facts pursuant to Section 322 of the Civil Practice Act (R. 148-161). The facts set forth therein would, if proven, conclusively establish (1) absence of Commission jurisdiction, valid investigative purpose, and compliance with statutory conditions to immunity; and (2) Commission exercise of federal functions and collaboration with federal agencies in the instant investigation, subpoenaing and enticement of petitioner into the jurisdiction of New York (*R. ibid.*). Under New York Law, those facts are deemed admitted, in the absence of "a sworn statement

either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters", C. P. A. § 322, except in certain situations not relevant herein. The Commission failed to make a denial in accordance with the statute (R. 162).[1]

Thereafter, the motion to adjudge in contempt came on to be heard before Special Term. Petitioner opposed the motion by affidavit (R. 163, 177) which noted the refusal to respond to the notice to admit (R. 176, 177), reasserted his jurisdictional challenge, asserted that the denial of deposition and discovery violated his constitutional and statutory rights (R. 163-164) and demanded a hearing:

> "* * * a decision should not be made upon the basis of an affidavit, particularly of a generalized and inadequate form presented by the Commission, but should be supported by testimony of witnesses subject to cross-examination by your deponent's counsel, with the additional protection of the granting of the motion to take the depositions and to have a discovery and inspection." (R. 171)

Petitioner also challenged each of the contentions made by the Commission. He charged, *inter alia*, with support-

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[1] Among the significant facts set forth in the notice were the following: The Commission's intention "to publicize in the form of a public hearing respondent's * * * reliance upon his constitutional privilege against self-incrimination" (No. 29); that "respondent was not apprised by the petitioner on June 22, 1960, as to the subject matter of the investigation or as to the pertinency of any of the questions put to the respondent" (No. 30); that "the instant investigation in which the respondent was called as a witness * * * was the result of collaboration between [the Commission] and agents of the Federal Government including * * * the Federal Bureau of Investigation" (No. 34); that "the [Commission's] inquiries made of * * * [petitioner] related to persons in counties other than those whose prosecutors were given notice * * *" (No. 40); that in instructing petitioner to return, the Commission did not "intend to have respondent return to New York State for the purpose of adducing testimony", No. 45 (R. 148-161).

ing facts, that the Commission "is engaged * * * in active collaboration with federal agencies" and that its accusations relate to "a wide variety of federal crimes in the area of labor relations" (R. 167); that "the Commission's papers do not show that it has jurisdiction over the subject matter of this investigation" (R. 168); that its papers "do not show the pertinency of the questions" and that "these questions are not pertinent to any investigation" (R. 168); that its purpose in subpoenaing petitioner "was not the bona fide one of carying out the purposes of the Waterfront Commission Act and of adducing information necessary as a basis for recommendations to the Legislatures * * *" (R. 169).

Denying the requested hearing, Special Term decided the case solely upon affidavits in a short opinion, *infra*, p. 29, making no finding concerning jurisdiction, public purpose, pertinency or luminosity (R. 177).

It directed petitioner's indefinite commitment until he answered the questions (*infra*, 36). The Appellate Division, First Department, affirmed that final order. After petitioner's appeal as of right was dismissed, he moved the Court of Appeals for leave to appeal from the Appellate Division's orders in the proceeding to adjudge in contempt and in the application to take a deposition and discovery. Petitioner raised, in an affidavit of counsel and in an accompanying brief, the various issues of federal constitutional right and construction of the interstate compact (*infra*, pp. 25-28).

The Court of Appeals denied petitioner's motion for leave to appeal from the final order in the contempt proceeding. It dismissed the motion insofar as it related to the depositional aspect of the case.

Reasons for Granting the Writ

1. This case presents an important constitutional question under the Fourteenth Amendment, which, it is submitted, was determined by the courts below in a manner irreconcilable with this Court's decision in *In re Oliver*, 333 U. S. 257.

The adjudication of contempt herein was made solely upon affidavits and without a hearing which petitioner had specifically demanded (R. 171). The denial of due process was compounded by the withdrawal from petitioner of all defensive methods normally available under New York procedure.

Thus, he was denied the opportunity to prove his charges through deposition and discovery. The allegations which he set forth in his Notice to Admit were not contested and are necessarily deemed admitted under New York Law; none of the courts below question that fact. This case thus presents the novel situation in which although all of petitioner's contentions are deemed admitted (*supra*, pp. 6, 7), he was denied the opportunity to buttress his case by a deposition or discovery, his demand for hearing was rejected, and he was adjudged in contempt on the basis of affidavits whose allegations he contested.

Even in cases not involving commitment to prison, this Court has held that due process requires a fair hearing. *Morgan* v. *United States*, 304 U. S. 1; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123. "When the Constitution requires a hearing, it requires a fair one * * *." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50. And confrontation and cross examination are essential ingredients of a fair hearing:

> "* * * A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights in-

clude, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel * * *." *In re Oliver*, 333 U. S. 257, 273.

Even in deportation cases, an area of alien control where the jurisdiction of the Executive has been characterized variously as "inherent in the executive power" (*United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542), and "absolute and unqualified" (*Fong Yue Ting* v. *United States*, 149 U. S. 698, 707), due process has consistently been held to require confrontation and cross-examination. *Ungar* v. *Seaman*, 4 F. 2d 80, 82 (CA 8, 1924); *Maltez* v. *Nagle*, 27 F. 2d 835, 837 (CA 9, 1928); *Svarney* v. *United States*, 7 F. 2d 515, 517-518 (CA 8, 1925); *Sardo* v. *McGrath*, 196 F. 2d 20, 22 (CA DC, 1952); see *Wong Yang Sung* v. *McGrath*, *supra*, 339 U. S. at 50; *cf. Jay* v. *Boyd*, 351 U. S. 345.

The present case presents an even more compelling claim to a hearing since the demands of due process are much greater in a contempt proceeding, which is quasi-criminal in nature. This Court has declared that "due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." *In re Oliver*, 333 U. S. 257 at 275, citing *Cooke* v. *United States*, 267 U. S. 517.

Consistently, contempt adjudications have been preceded by hearings at which witnesses testified (*Re Savin*, 131 U. S. 267; *Tinsley* v. *Anderson*, 171 U. S. 101; *Blackmer* v. *United States*, 284 U. S. 421. Where hearings were denied, contempt adjudications were vacated. *Cooke* v. *United States*, *supra*; *In re Oliver*, *supra*.

Petitioner's treatment is condemned by this Court's decision in *Hovey* v. *Elliott*, 167 U. S. 409, where in a different context a lower court claimed the right "to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refused to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of contempt of court."[2]

"The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question. *Delaware River Joint Toll Bridge Commission, Pennsylvania—New Jersey* v. *Colburn*, *supra*, 310 U. S. at page 427 • • •. Moreover, the meaning of a compact is a question on which this Court has the final say. • • •" *Petty* v. *Tennessee Missouri Bridge Comm.*, 359 U. S. 275, 278. This is particularly appropriate in view of the active role played by the Congress in the establishment of this Compact. *De Veau* v. *Braisted*, 363 U. S. 149-150.[3]

Pursuant to this rule, petitioner seeks this Court's construction of the Waterfront Commission compact in two respects: first: was he immune from process under the explicit terms of the Waterfront Commission Act, and second, can the Commission compel testimony under a grant of immunity where it failed to comply with the statutory conditions precedent to such a grant.

a. Part II, Section 5-m of the Compact, exempts from process any person coming into New York from New Jer-

[2] Similarly, *Cohn* v. *Kramer*, 136 F. 2d 293, 295-6 (C. A. 6th, 1943) (civil contempt). *In re Rockhill*, 70 F. Supp. 1465.

[3] "[I]t is of great significance", said this Court, that "Congress expressly gave its consent to • • • implementing legislation not formally part of the compact"—which is described as "unique in the history of compacts" (*De Veau* v. *Braisted*, *supra*, p. 154).

sey, pursuant to a Commission subpoena, if the process is "in connection with matters which arose before his entrance into such state under the subpoena" (*infra*, p. 24).

The facts here are not in dispute. Petitioner came into New York on June 23, 1960, in response to the Commission's subpoena. He was served on June 23, 1960 with an order to show cause to adjudge him in contempt by reason of his testimony the prior day, June 22, 1960. Consequently, that service was in direct violation of Section 5-m. The opinion at Special Term held that petitioner had not entered New York on June 23 because he had previously entered it on June 17. The Court did not explain why petitioner "must be deemed" to have made a single entry; nor did it illuminate the "purposes of applying Section 5-m" which were aided by its conclusions (R. 84). The statutory language supports petitioner's position. There are no reported judicial decisions on the subject, and it is the only one which is factually correct. The two State appellate courts, not having written opinions, must be deemed to have agreed with the Special Term. This raises a federal question of the Compact's construction. Since the Commission is presently engaged in large scale investigations, and since bi-state agencies with similar statutes are increasingly active, the problem posed is likely to recur frequently and should not remain unresolved.

b. The second problem of statutory construction relates to the conditions precedent to the grant of immunity. Under Part II, Section 5-b of the compact, *infra*, pp. 23, 24, immunity can be granted upon notice to "the appropriate district attorney or prosecutor having an official interest therein". Petitioner pointed out at Special Term—without challenge—that by reason of the geographic location of the activities ascribed to him, the District Attorneys of Queens County, Nassau County and Suffolk County, among others, were entitled to and had not been given such notice (R.

166-167). The Commission merely argued that petitioner had immunity regardless of its compliance with the statutory conditions. While the Commission's inadequate notice may save for the witness "any immunity otherwise properly conferred on him", it is the witness's right to insist that he not be required to surrender his constitutional privilege until the Commission complies strictly with its statutory conditions: "Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision" (*infra*, p. 24).

3. The circumstances under which petitioner was compelled to appear in New York on June 23, 1961, at which time he was served with the process instituting contempt proceedings raise a substantial question of due process in addition to that of statutory construction already discussed (*supra*, pp. 11, 12). The purported purpose of the instruction on June 22nd to return pursuant to the subpoena (R. 21) was to appear "as a witness and to testify" (R. 21, 43). The hearing of June 23rd was a *pro forma* one intended to furnish a colorable basis for the June 22nd direction to return (R. 74-75). Hence, the direction and the subpoena which it implemented were examples of a "fraudulent pretense [whereby] a party is brought within the jurisdiction". *Carpenter* v. *Spooner*, 2 Sandf. 717 (1850). It is settled under New York law that where one is "enticed into this jurisdiction from another state by fraud and deceit • • • in order that he might be served with a summons and complaint", service so effected is invalid. *Neotex Mfg. Co.* v. *Eidinger*, 250 App. Div. 504, 505 (1st Dept., 1939); *Gampel* v. *Gampel*, 114 N. Y. S. 2d 474.

Whereas misrepresentation by a private party may constitute merely fraud, where practiced by a governmental agency it represents a denial of due process. A "court will not sanction, even inferentially, such abuse or degradation

of its process". *Jurisdiction by Trickery: Enticement for Service of Process*, 7 *Duke Law Journal* 52 (1957). See *Tickle* v. *Barton*, 142 W. Va. 188, 95 S. E. 2d 427, (1956); *Larned* v. *Griffin* (C. C.) 12 Fed. Rep. 590. The Commission engaged in what this Court has in a not unrelated context described as "an indefensible sort of entrapment". *Raley* v. *Ohio*, 360 U. S. 423, 426; *Cf. Sorrells* v. *United States*, 287 U. S. 435, 442. See generally *Berger* v. *United States*, 295 U. S. 78.

4. This case raises, for the first time, the sufficiency of a grant of immunity from state, in contradistinction to federal, prosecution where the investigating agency is, (i) created by interstate compact with congressional consent; (ii) its purpose and operations are instinct with vital federal interests and functions; and (iii) its investigation of petitioner was the result of collaboration with other federal agencies, concerned with the disclosure and prosecution of federal crimes.[4]

a. There is, therefore, presented to this Court the important question as to the nature of the compact creating the Waterfront Commission. Such an agency, this Court has said, "performs high functions in our federalism" and the "construction of a compact sanctioned by Congress • • • presents a Federal question" on which this Court must make the ultimate decision. *Petty* v. *Tennessee-Missouri Bridge Comm., supra*, at 278. See also Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 694-695 (1925).

Moreover, "once compacts are approved and ratified and the agencies they create begin operations, direct rela-

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[4] Petitioner's argument herein is contrary to that of petitioners in *De Veau* v. *Braisted*, 363 U. S. 144, and *Murphy* v. *Waterfront Commission*, Oct. Term 1961, No. 362, *cert. den.* 30 L. W. 3144, that the Commission is a state agency whose functions were preempted by other federal legislation.

tions between them and federal executive departments become common • • •." Leach, *The Federal Government and Interstate Compacts*, 29 Ford. L. Rev. 421, 431 (1961). They unite "the powers of the national government with those of a group of states through a single mechanism." Zimmerman and Wendell, *The Interstate Compact Since 1925* (p. 8).

A further significant aspect of the federal attributes of an interstate compact is that a state statute which conflicts with an interstate compact is invalid and unenforceable. *Green* v. *Biddle*, 8 *Wheat.* (21 U. S.) 1; *State* v. *Hoofman*, 9 Md. 28 (1856); *President, Managers C.* v. *Trenton City Bridge Co.*, 13 N. J. Eq. 46 (1860); *State* v. *Faudre*, 54 W. Va. 122, 146 S. E. 269 (1903). The federal aspect of the compact is shown further by Congressional ability to "provide, in certain cases, for enforcement of the terms of the compact by national agencies until a recalcitrant state enforced them." *The Interstate Compact Since 1925*, *supra*, at p. 56.

Upon this Court's construction of the compact, see *Petty* v. *Tennessee-Missouri Bridge Comm.*, *supra*, it will appear, we believe, that the Commission is at least quasi-federal in character, that it is investigating federal crime. *Cf. DiCarlo* v. *United States*, 102 F. Supp. 597 (N. D. Ohio, 1952). If so, its power to compel testimony in the face of danger of federal prosecution is no greater than that of a federal grand jury. See *Ullman* v. *United States*, 350 U. S. 422.

b. However, should the Court determine that this is a state agency totally without federal functions, it will then reach the issue left open in *Knapp* v. *Schweitzer*, namely, whether in a case of "collaboration between state and federal officers the defendant could successfully assert privilege in the state proceeding" (357 U. S. 371, 380). For here,

unlike the situation in *Knapp*, the Commission is being "used as an instrument of federal prosecution or investigation." (*supra* at 380).

Under these circumstances, the decision below is in principle in conflict with this Court's decisions in *Lustig* v. *United States*, 338 U. S. 74, and *Byars* v. *United States*, 273 U. S. 28. Since the Commission was in fact collaborating with federal agencies, the compulsion to testify here would violate petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment as well as the Fourteenth Amendment. In addition, it would constitute an unreasonable search and seizure which under the decisions would be a violation of the Fourteenth Amendment. See *Wolf* v. *Colorado*, 338 U. S. 25, 27, and *Elkins* v. *United States*, 364 U. S. 206.

The federal character of the Commission and its collaboration *in this case* with other federal agencies will permit a reversal of the orders below consistent with this Court's decisions in *Knapp* v. *Schweitzer*, 357 U. S. 371, *Feldman* v. *United States*, 322 U. S. 487 and *Mills* v. *Louisiana*, 360 U. S. 230. Nevertheless, if certiorari were granted without limitation, petitioner would seek reconsideration by the Court of the issues raised in those cases. Their public importance and the close division on the subject in this Court justifies a further analysis of the problem in the appealing context of this case. See Kroner, *Self-Incrimination: the External Reach of the Privilege*, 60 Col. L. Rev. 816 (1960).

This is particularly true since the Commission has now instituted contempt proceedings in New Jersey against other persons to whom it has proffered state, not federal, immunity. *In the Matter of the Application of the Waterfront Commission of New York Harbor to Punish John Moody, Sr. For Failure to Obey a Subpoena* (Superior Court of New Jersey, Law Division, Hudson County).

5. *a.* This case presents for the first time the application of the due process clause to investigations conducted under an interstate compact. The important question here is whether the requirements of due process, declared by this Court to be applicable to congressional committees, should not also be applicable to such agencies performing "high functions in our federalism." *Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U. S. 275 at 279.

Thus, the Waterfront Commission was required as a matter of due process to apprise petitioner at the time of his appearance of the subject matter of the inquiry and of the Commission's jurisdiction thereof (R. 23-43). *Watkins* v. *United States*, 354 U. S. 178, 214; *Sacher* v. *United States*, 356 U. S. 576, 578. See to the same effect, *Kilbourn* v. *Thompson*, 103 U. S. 168; *Matter of Barnes*, 204 N. Y. 108. These factors appear to be lacking in the instant case.

The Commission's own hearings are silent as to purpose, subject matter and the pertinency of the particular questions, see *Watkins* v. *United States*, 354 U. S. 178, 214. It was not until the contempt proceedings that it made even a generalized statement as to its purpose namely, "to determine the extent of criminal influences in the I. L. A., which represents all longshoremen and checkers in the Port of New York" (R. 15). This hardly established pertinency in view of the fact that petitioner had never been convicted of crime and that the Locals with which he was connected were not waterfront locals subject to the Commission's jurisdiction (R. 168). Not only did the Commission not seek to establish the pertinency of any particular question, but some of the questions on their face—those dealing with strikes in other industries—had nothing whatsoever to do with the waterfront (R. 6).

In the light of the direct challenge made by petitioner to such matters as jurisdiction, pertinency and luminosity

it was the duty of the Court at Special Term to make a determination of pertinency as to each of the questions which were the basis for indefinite commitment. Its failure to exercise that judicial function compounded the denial of due process.[5]

b. Assuming, *arguendo,* that the Commission was a purely state agency, there would still be presented the problems of compliance with the due process clause of the Fourteenth Amendment. This Court has three times in recent years vacated contempt convictions arising from state investigations where substantial claims of violation of due process were upheld. *Scull* v. *Virginia,* 359 U. S. 344; *Sweezy* v. *New Hampshire,* 354 U. S. 234; *Raley* v. *State of Ohio,* 360 U. S. 423. See also *Gibson* v. *Florida Legislative Investigation Committee,* No. 70, October Term 1961.

The instant case presents many of the defects causing reversal in the above cited cases. For example, if in *Scull,* "the purposes of the inquiry, as announced by the Chairman, were so unclear * * *," (359 U. S. 353), what should be said of the instant case where no purpose was stated to the witness? A state investigation conducted solely for publicity purposes is no more consistent with due process than a similarly intended federal one. A finding of pertinency is as necessary to due process in a state investigation as in a federal one.

While this case does not involve the issues of political association now before the Court in *Liveright* v. *United States,* No. 11, October Term 1961, and the related cases, it raises fundamental issues of due process which affect all governmental investigations.

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[5] Even in *Uphaus* v. *Wyman,* 360 U. S. 72, the state courts passed upon the pertinency of the particular questions.

Conclusion

This case involves the interaction of two federal problems not previously presented to the Court: the construction of an interstate compact, and its use to deprive a citizen of his constitutional privilege against self-incrimination, his right to due process and his right to defend himself in a quasi-criminal proceeding. This confluence of important problems which may be expected to arise frequently in a period of increasing governmental investigation now calls for consideration by this Court.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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VICTOR RABINOWITZ,
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RABINOWITZ & BOUDIN,
ARTHUR SCHUTZER,
Of Counsel.

Dated, November 12, 1961.

APPENDIX A

The Constitutional Provisions and Statutes Involved

Constitution of the United States

Article 1, Section 10, Clause 3

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE ACT OF AUGUST 12, 1953, C. 407, 67 STAT. 541

The consent of Congress is hereby given to the compact set forth below to all of its terms and provisions, and to the carrying out and effectuation of said compact, and enactments in furtherance thereof * * *.

THE WATERFRONT COMMISSION COMPACT

WATERFRONT COMMISSION ACT, PART I, MCKINNEY'S UNCONSOLIDATED LAWS, SECTION 9810 (FORMERLY 6700-dd).

In addition to the powers and duties elsewhere prescribed in this compact, the Commission shall have the powers:

* * *

8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;

Appendix A

WATERFRONT COMMISSION ACT, PART I, MCKINNEY UNCONSOLIDATED LAWS, SECTION 9862
(FORMERLY 6700-nn)

* * *

1. The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case therein pending.

WATERFRONT COMMISSION ACT, PART I, MCKINNEY'S UNCONSOLIDATED LAWS, SECTION 9810
(FORMERLY 6700-dd)

In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:

* * *

(11) To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objectives of this compact;

(13) To make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district, for the alleviation of the evils described in article I and for the effectuation of the purposes of this compact. Such annual reports shall state the commission's finding and determination as to whether the public necessity still exists for (a) the continued registration of longshoremen, (b) the continued licensing of any occupation or employment required to be licensed hereunder and (c) the continued public operation of the employment information centers provided for in article XII;

Appendix A

WATERFRONT COMMISSION ACT, PART II, MCKINNEY UNCONSOLIDATED LAWS, SECTION 9906
(FORMERLY 6700-tt-2)
(SECTION 5-b OF THE COMPACT)

Additional powers of the commission.

In addition to the powers and duties elsewere described in this act, the commission shall have the following powers:

* * *

5. To confer immunity, in the following manner: In any investigation, interview or other proceeding conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the state of New York or the state of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

"Immunity" as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees

appointed pursuant to the provisions of section three of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

Immunity shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him.

WATERFRONT COMMISSION ACT, PART II, McKINNEY UNCONSOLIDATED LAWS, SECTION 9917
(FORMERLY 6700-tt-13)
(SECTION 5-m OF THE COMPACT)

Exemption from arrest and service of process:

If a person, in obedience to a subpoena, issued pursuant to article four or article eleven of the compact directing him to attend and testify, comes into either state party to this compact from the other state, he shall not, while in that state pursuant to such subpoena, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into such state under the subpoena.

APPENDIX B

Further Statement of Manner in Which Federal Questions Sought to Be Reviewed Were Raised

1. *Cross-Notice of Motion to Vacate Service:*

(a) The said respondent was exempt from service of the said order to show cause by reason of the provisions of the Waterfront Commission Act, Part II, Section 5-m, McKinney Unconsolidated Laws, Section 6700-11-13; and

(b) The said respondent was enticed by the applicant, Waterfront Commission of New York Harbor, into the State of New York for the purpose of service of the said order to show cause; and for such other and further relief as to this Court may seem just and proper (R.68-69).

2. *Motion for Deposition and Discovery.*

The Order to Show Cause sought deposition and discovery with respect to the following matters:

1. The subject matter of the investigation and whether it was within the Commission's jurisdiction.

2. The Commission's purpose in subpoenaing respondent.

3. The Commission's compliance with the statutory conditions precedent to the grant of immunity.

4. The nature of the Commission as a federal instrumentality by reason of its functions and activities.

5. The Commission's collaboration with agents of the United States Government in the investigation of respondent and of the International Longshoremen's Association and locals thereof, and in the

issuance of a subpoena to him, the service of process upon him and the purported grant of immunity to him.

6. The pertinency of the particular questions put to respondent to the subject matter of the investigation and whether the Commission made clear to respondent the said subject matter and pertinency at the time of the alleged contempt.

7. The Commission's purpose in directing your deponent on June 22, 1960 to return for the alleged purpose of examining him further on June 23, 1960 and the Commission's deceit and misrepresentation in this respect (R. 88-89).

3. *Affidavit in Support of Motion for Deposition and Discovery*:

6. • • • It is and was your deponent's belief that the purpose of conducting a public session June 22, 1960 was therefore an improper one and solely for the purpose of exposing your deponent and violating his right of privacy (R. 93).

• • •

11. Your deponent will also take the position that under the United States Constitution and as applied to the facts in this case, notice was required to be given to the federal prosecuting officials and that in the absence of a grant of immunity by them, the Commission could not compel your deponent's testimony. The reasons for this contention are the following:

(a) Your deponent submits, upon information and belief, that the subpoenas issued to him were the result of collaboration between the Commission and the representatives of the Justice Department,

National Labor Relations Board, and other federal agencies. Such collaboration with federal officials is contemplated by the Waterfront Commission Act and is referred to in annual reports of the Commission.

(b) Upon information and belief the whereabouts of your petitioner for the purposes of the service of process were the result of reports by agents of the Federal Bureau of Investigation to the Commission.

(c) Upon information and belief the Commission is in fact a federal instrumentality and is engaged in a number of functions on behalf of the United States Government and receives federal funds (R. 96-97).

4. *Affidavit in Opposition to Motion to Adjudge in Contempt*:

It is thus presently impossible for me to make a full factual presentation in defense of my position in these proceedings, for, as the affidavits indicate, much of this evidence is within the sole control and possession of the Commission and possibly of other government agencies, and much of it is in documentary form. Certain of these records and papers have been requested of the Commission, as appears from my affidavit of July 26, 1960 in support of the then pending motion to take the Commission's deposition. The said affidavit and the exhibits annexed thereto are incorporated herein with the same force and effect as though specifically set forth herein. I respectfully submit that to compel me to proceed under these circumstances constitutes a denial of due process.

First, I respectfully submit that the Court is without jurisdiction over my person because I was exempt from service of the order to show cause instituting

this proceeding under the Waterfront Commission Act, Part II, Section 5-m, McKinney's Unconsolidated Laws, Section 5700-tt-13 • • • (R. 163-164).

• • •

Secondly, the Commission seeks to compel my testimony notwithstanding my claim of my constitutional privilege against self-incrimination • • • (R. 164).

• • •

The Waterfront Commission is engaged, according to its annual reports, in active collaboration with federal agencies. Accusations of the Waterfront Commission in this case as well as in a series of other cases in New York and in New Jersey included, upon information and belief, a wide variety of federal crimes in the area of labor relations. The Waterfront Commission is the result of said legislation approved by the Congress of the United States. It is specifically provided in the Waterfront Commission Act that in certain respects it fulfills functions as an agency of the United States Government. I am advised by counsel and believe that under these circumstances immunity against federal prosecution is a prerequisite to compulsion of testimony.

Fourthly, the Commission's papers do not show that it has jurisdiction over the subject matter of this investigation (R. 167-168).

• • •

Fifthly, your deponent respectfully submits that the Commission's purpose in subpoenaing your deponent was not the bona fide one of carrying out the purposes of the Waterfront Commission Act • • • (R. 169).

APPENDIX C

Opinion at Special Term

Application to punish the respondent as and for a contempt, for refusal to testify on June 22, 1960, pursuant to a duly served subpoena of the commission is granted. The objections raised by the respondent are overruled as not being available under the circumstances or as having been disposed of by previous and controlling court precedents. Settle order.

APPENDIX D

1. Order of Court of Appeals

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fifth day of October A. D. 1961.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

Mo. No. 453

In the Matter of

the Application of the WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent,

For an Order Directing Punishment of ANTHONY MARCHITTO,

Appellant,

For Contempt &c.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the contempt order, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the order denying appellant the right to discovery, be and the same hereby is dismissed.

A copy

GEARON KIMBALL,
Deputy Clerk.

(Seal)

2. Order of Supreme Court, New York County, Special Term

At a Special Term of the Supreme Court, Part 1 thereof, held in and for the County of New York at the Court House thereof, in the Borough of Manhattan, City, County and State of New York, on the 20th day of March, 1961.

Present:

HON. OWEN McGIVERN,
Justice.

[SAME TITLE]

A motion having duly come on by order to show cause before this Court on the 10th day of October, 1960, for an order to punish Anthony Marchitto as and for a contempt of Court pursuant to provisions of Section 1 of Article XIV of the Waterfront Commission Compact for failure to testify before the Waterfront Commission of New York Harbor, pursuant to a subpoena duly issued by the Water-

front Commission of New York Harbor and duly served on Anthony Marchitto, together with such other and further relief as may be just and proper,

Now, upon reading and filing said order to show cause dated June 23, 1960, signed by Mr. Justice Morris E. Spector, and the affidavit of William P. Sirignano, Esq., sworn to June 23, 1960, and the exhibits annexed thereto, to wit, the affidavit of service of the aforesaid subpoena by Gerald V. Clarke, sworn to June 10, 1960, the copy of the aforesaid subpoena annexed thereto, a copy of the resolution of the Waterfront Commission authorizing public hearings, certified on June 15, 1960 by George A. Merrill, Jr., Secretary of the Waterfront Commission of New York Harbor, and the transcript of the testimony of Anthony Marchitto before the Waterfront Commission on June 22, 1960, and Exhibits 56A-56H annexed to said transcript, and the additional affidavit of William P. Sirignano, Esq., sworn to August 10, 1960, all in support of said application of the Waterfront Commission of New York Harbor to punish Anthony Marchitto as for a contempt of Court, and due proof of service thereof, and the affidavit of Anthony Marchitto, sworn to August 19, 1960, and the exhibits annexed thereto, to wit, the copy of said Anthony Marchitto's notice of motion to set aside the service herein, a copy of said Anthony Marchitto's notice to admit facts, and a copy of the Waterfront Commission's reply to notice to admit facts, in opposition thereto, and after hearing Irving Malchman, Esq., Assistant Counsel of the Waterfront Commission of New York Harbor, in support thereof, and Leonard B. Boudin, Esq., attorney for said Anthony Marchitto, in opposition thereto, and due deliberation having been had, and the decision of the Court filed herein,

Now, on m tion of William P. Sirignano, Esq., general counsel and attorney for the Waterfront Commission of New York Harbor, it is

Appendix D

ORDERED, that said Anthony Marchitto is hereby adjudged guilty of contempt of Court for his contumacious, wilful and unlawful refusal to answer certain questions before the Waterfront Commission of New York Harbor as required by the aforesaid subpoena of the Waterfront Commission of New York Harbor dated June 9, 1960, to wit:

1. Q. "What is your present occupation, Mr. Marchitto?"

2. Q. "Mr. Marchitto, were you ever an officer or a trustee of Local 1478?"

3. Q. "Do you know Frank Campbell?"

4. Q. "Were you associated with Frank Campbell in connection with Local 1478?"

5. Q. "Are you an officer of Local 1823?"

6. Q. "Do you know Joe 'Heels' Murphy?"

7. Q. "Were you associated with Joe 'Heels' Murphy in the running of Local 1823, ILA?"

8. Q. "Did you engage in strike-breaking activities with Frank Campbell and Joe 'Heels' Murphy in 1959 during the Bloomingdale strike?"

9. Q. "Did you engage in strike-breaking activities in connection with Whelan's Drug Store strike in 1959?"

10. Q. "Did you have access to the books of Locals 1478 and 1823 prior to October, 1958?"

11. Q. "Did you have access to the funds of Locals 1478 and 1823?"

12. Q. "Do you know Fred Baron,"

and it is further

ORDERED, that the said refusal of said Anthony Marchitto to answer the aforesaid questions was calculated to and actually did defeat, impede, impair and prejudice the rights and remedies of the Waterfront Commission of New York Harbor herein, and it is further

ORDERED, that said Anthony Marchitto for his misconduct shall be fined the sum of two hundred and fifty dollars ($250) to be collected and paid over to the Waterfront Commission of New York Harbor, and it is further

ORDERED, that said Anthony Marchitto is hereby directed to appear and attend forthwith at the offices of the Waterfront Commission of New York Harbor at 15 Park Row, New York, New York, and to submit to examination by the members of the Waterfront Commission, or their designees appointed pursuant to the provisions of section three of article III of the Waterfront Commission Act, upon the aforesaid questions; and it is further

ORDERED, that the Sheriff of any County to whom a certified copy of this order shall be delivered, shall forthwith on receipt thereof, and without further process, take the body of said Anthony Marchitto, and forthwith, commit and imprison him in the jail of said County where he shall remain until he shall have answered the aforesaid questions and until he shall have paid fines as aforesaid, or until he is discharged according to law.

O. McG.,
J. S. C.

Filed: March 20, 1961.
N. Y. Co. Clerk's Office.